

International law beyond cynicism and critique

A plea for a legal scholarship that offers alternatives instead of reinforcing the status quo

Gabriel M. Lentner

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Cynics do not have to look far: critical international law has uncovered the ways in which the forces of colonialism and imperialism have been present in the international legal system from its foundation to the present. According to [David Kennedy](#), it is not only cynical use of law by despots but experts, including legal scholars, that –subtly but surely – enable, reproduce, legalize and legitimize this international legal system.

With such devastating inferences about not only the state of international law but the role of legal experts in its reproduction, cynicism about the legal project altogether might be a natural response. What does not receive the same level of attention, however, is the effect of critique and cynicism in the real world. I am driven by the intuition that cynicism about and critique of international law (the former often the result of the latter) and its workings in scholarship might inadvertently serve to stabilize and legitimize the status quo. In other words, I want to know how and why such damning conclusions and assessments are not able to meaningfully change the very status quo of international law it so powerfully criticizes.

In this post I want to offer some preliminary thoughts on why that might be. Doing so, I first consider the role of (cynical and critical) legal expertise arguing that not only law but legal expertise has real distributional consequences. Next, I address the importance of believing in the possibility of change in that context and finally, I wish to direct attention to an alternative program eventually calling for a less legalistic view of real-world problems and solutions.

On the role of experts and critics: Fatalism rather than reform?

The reality of power politics and structural inequality in international relations often seem external to the work of legal experts, but David Kennedy demonstrates that experts indeed rule. Experts rule by providing the context for decisions, and thereby the facts and forces that are understood to impinge on a decision or those that need to be taken into account. That context, however, is the settled outcome of background work, and background work consists of the socially constructed knowledge of experts regarding interests and facts relevant for decision. In short, also legal experts contribute to the construction of reality and such background knowledge; the result of which is law's reproduction of the status quo. And cynics take that as a given.

Critics, on the other hand, do their work precisely in order to change the accepted “mainstream” background knowledge. The problem is, however, as identified in a [collection of critical international law scholarship](#) that ‘critical scholars are largely unwilling to address the issue of reform or change — whether it is possible, and upon what basis it might take place. As such, they confine themselves to critiques of the system and its discursive structures but fail to face the consequences of their work.’

One such consequence might be that critical work channels resources and energy including personal time and effort in certain ways (with prestigious appointments with international institutions, NGO's and universities along with salaries and other perks) and redirects them away from other, perhaps more viable, projects.

A deeper problem I identify in my research is a cynicism that may result from critique. If everything is wrong –for example, the colonial structures still existing in today's international law – if yesterday and tomorrow are just like today, investing energy into action towards a [transformative politics seems pointless](#). In other words, when the takeaway of international lawyers of institutions like the International Criminal Court (ICC) is what Thrasymachus says in [Plato's Republic](#), “everywhere justice is the same thing, the advantage of the stronger”; or that the (correct) finding that the UN Security Council (UNSC) was established to institutionalize the outcome of the Second World War, the inevitable cynical conclusion is that yesterday's international law is just as bad as today's. Any improvements are just distractions, and all efforts to change the status quo just results in another, more subtle way in which the status quo constitutes itself.

Instead, we need to believe in the possibility of change.

The Possibility of Change and an Alternative Program: The example of International Criminal Law

To escape such fatalism, I argue that we need, first, a belief in the possibility of change and, second, an alternative program. For real change, we need to first understand that legalism influences our ability to find remedies for existing (structural) problems. Consider the absence of any mechanism for the prevention of international crimes. The ICC Statute mentions in its preamble the determination to prevent such crimes, but nowhere is a mechanism established to fulfill this goal. The absence of any role for the UNSC to use its coercive powers for the prevention of international crimes is, of course, symptomatic for the problematic focus of the law on accountability rather than prevention. Focusing solely on heinous acts of individuals and prosecuting their crimes is seen as a means to tackling and mitigating the commission of international crimes. However, this narrows our field of vision and thus also our sense of possibility. Few international criminal law experts really understand the root causes for the outbreak of atrocity violence. This is where I want to offer an alternative program.

Just as human rights law and the rest of international law, international criminal justice has a tendency to treat only the tips of icebergs. While structural issues and root causes for atrocity crimes have recently been [acknowledged at the UN](#), armed

conflict, state and group terrorism and massacres gain much more public attention than structural causes for these very outbreaks.

An alternative program would thus look into adequate structural prevention. This can take many forms as it aims at removing root causes. The [existing research](#) pushes for a broadening of the concept to not only take into account root causes but also an understanding of the dynamic interaction between the risks posed by root causes and the locally-based mitigation factors that foster resilience to such risks. [Comparative genocide studies](#) have also identified a range of root causes and risk factors of social, political and economic dimensions.

In short, more research needs to be done in this area, but it is clear that legal scholars should play only a very limited role in this, except for the realization that without pointing to alternatives, law and legal expertise may do more to stabilize the status quo than to challenge it. It is alluring and tempting to believe that we as legal scholars are making a difference by uncovering power structures that cause inequality, but this is not enough. As long as critique is unable to offer alternatives, it might be cynically used to serve exactly opposite purposes.

Gabriel M. Lentner is Assistant Professor of International Law and Arbitration at Danube University Krems, Austria, a Transatlantic Technology Law Forum Fellow at Stanford Law School and currently (9/2019-6/2020) a Visiting Researcher at Harvard Law School. He holds a PhD in International Law from the University of Vienna School of Law, where he also serves as a Lecturer in Law. He would like to thank Christine Schwöbel-Patel for feedback on earlier thoughts on this topic.

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